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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 9

WILBUR C. KING, JERRY W. CARTER AND RICHARD A. MACK, AS AND CONSTITUTING THE FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION,

Appellants

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

BRIEF OF ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., APPELLEES

JAMES A. BISTLINE,
FRANK W. GWATHMEY,
Attorneys for Railroad Appellees.

OCTOBER 3, 1952.

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Opinions Below

The opinion of the specially constituted District Court appears in the Record at pages 132-139 and is reported in 101 F. Supp., at page 941.

The order of the Interstate Commerce Commission which gave rise to the proceedings in the District Court appears in the Record at pages 129-130; the report of the Commission upon which said order was made appears at pages 80-121 of the Record; and is reported 278 I. C. C., at pages 41-74, *Increases in Florida Intrastate Rates*.

Jurisdiction

The final judgment of the District Court was entered July 17, 1951 (R. 140) and appeal was allowed September 7, 1951 (R. 142). Jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 2101(b). Probable jurisdiction was noted January 2, 1952 (R. 824).

Statute Involved

The statute involved is the Interstate Commerce Act, Part I, particularly Sections 13(2)(3)(4) and 15a(2) (49 U. S. C. Sections 13(2)(3)(4) and 15a(2)) and the 1940 declaration of "National Transportation Policy" which now constitutes a preliminary part of said Act (54 Stat. 899, 49 U. S. C. 4281 (1940))—reproduced in the Appendix, *infra*, pp. 68-70.

Statement of Case

This appeal brings up for review the final judgment (R. 140) of a statutory three-judge District Court for the Northern District of Florida, Tallahassee Division, Case No. 292-T-Civil, *King, et al.* v. *United States, et al.*, reported 101 F. Supp., pages 941-946 (R. 132-139). The judgment was entered upon a complaint (R. 1) filed September 16, 1950 by Wilbur C. King, Jerry W. Carter and Richard A. Mack, as and constituting the Florida Railroad and Public Utilities Commission, against the United States. The pur-

pose of the complaint was to enjoin, set aside and annul an order of the Interstate Commerce Commission, issued July 25, 1950 (R. 129) under the provisions of Section 13(4) of the Interstate Commerce Act, whereby that Commission directed a general raising of the rates and charges of the railroads operating in the State of Florida for the intrastate transportation of freight between points within said state.

A number of Florida shippers and shipper organizations intervened as plaintiffs. The Interstate Commerce Commission intervened as defendant and answered (R. 20), as did also the Atlantic Coast Line Railroad Company and eight other railroads constituting the major roads operating in Florida (R. 26).

The District Court denied the injunction prayed for and dismissed the complaint (R. 140).

The order complained of

The order complained of was made in a proceeding of investigation, Docket No. 30140, *Increases in Florida Intrastate Rates*, instituted by the Interstate Commerce Commission by order dated January 5, 1949 (R. 78) in response to a petition filed by Florida railroads (R. 28), with respect to the failure and refusal of the Florida Railroad and Public Utilities Commission to authorize or permit increases in the intrastate rates and charges, applicable upon shipments of freight moving between points within Florida, by amounts corresponding with increases theretofore authorized by the Interstate Commerce Commission (hereinafter referred to as the Commission) and made effective in the interstate rates and charges applicable upon shipments moving between points in Florida and points in other states, as well as generally throughout the south. All railroads operating in Florida, subject to the jurisdiction of

the Commission, were made respondents in said investigation.[1]

The report of the Commission was issued May 4, 1950 (R. 80). No order was entered immediately in No. 30140, it being stated in the report that an order would be entered "unless we are notified by the Florida Commission, within 30 days from the date of service of this report, that it will permit promptly the increases herein approved" (278 I. C. C., at p. 74, R. 121). Petitions for rehearing or reconsideration were thereafter filed by the Florida Railroad and Public Utilities Commission and by various shippers (R. 122); on June 27, 1950 the respondent railroads filed a reply to said petitions and motion for the entry of an order (R. 124); and by order dated July 25, 1950, said petitions were denied (R. 129) and on the same day the order here complained of was entered. The order provides as follows (R. 129):

> "This proceeding having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission, on May 4, 1950, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and
>
> "*It appearing*, That as set forth in said report and in accordance with the practice in such proceedings, the Commission stated that an order carrying into effect the findings in said report would be entered, unless we were notified by the Florida Commission, within 30 days from May 15, 1950, the date of service of said report, that it would permit promptly the in-

[1] I. & S. Docket No. 5646, *Sugar Cane from Florida to Clewiston, Fla.*, which concerned the suspension of a certain tariff publishing interstate transit rates in connection with the transportation of sugar cane to Clewiston, Fla., was heard immediately following the hearing in Docket No. 30140, *Increases in Florida Intrastate Rates*, and the two proceedings were orally argued before the Commission at the same time and are embraced in one report.

creases therein approved, and that no such notification has been made by the Florida Railroad and Public Utilities Commission:

"*It is ordered*, That respondents in this proceeding, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before September 28, 1950, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to abstain, from practicing (1) the unjust discrimination against interstate commerce, and (2) the undue preference of and advantage to certain persons and localities in intrastate commerce and, undue prejudice and disadvantage to certain persons and localities in interstate commerce, found in said report to exist.

"*It is further ordered*, That said respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before September 28, 1950, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply for the intrastate transportation of freight from and to points in the State of Florida freight rates and charges which shall be no lower than the approved rates and charges, or on the approved rate bases, as provided in said report.

"*And it is further ordered*, That this order shall continue in force until the further order of the Commission."

The ultimate findings of the Commission are set out in the report, which is made a part of the order (278 I. C. C. 41, 72, R. 80, 118), and are quoted in full at pp. 37-40, *infra*.

Questions Presented

1. In authorizing general increases in interstate freight rates, or in directing increases in intrastate freight rates

under the provisions of Section 13(3)(4), may the Commission lawfully give due consideration, among other things, to losses sustained by the railroads in connection with passenger service operations and on account of such losses make greater freight rate increases than might otherwise be needed?

2. Did the Commission make and set out in its report all findings, supported by evidence, appropriate and necessary for the support of the order here complained of?

Summary of Argument

1. The order complained of was necessary for the fulfillment of the duty imposed upon the Commission by the 1940 declaration of the National Transportation Policy and Sections 15a(2) and 13(3)(4) of the Interstate Commerce Act. The authority and duty of the Commission under Section 13(4) to order a raising of the intrastate rates of the particular railroads involved, for the purpose of enabling such roads to provide adequate and efficient transportation service as a part of the national transportation system, is no longer open to dispute.[2]

2. The record shows, and the Commission found, that the earnings of the railroads serving the State of Florida had fallen to a low level and that such roads were urgently in need of the additional revenue expected to be derived from the intrastate rate increases ordered by the Commission.

3. In determining the revenue needs of the railroads the Commission must of necessity consider revenues in their entirety as derived from operations as a whole, including

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[2] *Wisconsin R. R. Comm.* v. *C., B. & Q. R. Co.*, 257 U.S. 563.
Florida v. *United States*, 282 U.S. 194; 292 U.S. 1.
Georgia Public Service Comm. v. *United States*, 283 U.S. 765.
United States v. *Louisiana*, 290 U.S. 70.
Illinois Com. Com. v. *United States*, 292 U.S. 474.
North Carolina v. *United States*, 325 U.S. 507.

both freight and passenger operations. The Court has repeatedly upheld orders of the Commission directing a raising of intrastate rates following general increases theretofore authorized and made effective in interstate rates, such general increases having been determined upon a consideration of railroad revenues from all operations, both freight and passenger.[3]

4. Following nationwide investigations the Commission authorized successive general increases in interstate freight rates and charges of the railroads throughout the country, including interstate freight rates and charges applicable to, from or between points in the State of Florida. In so doing the Commission had before it and duly took into account the fact that following the war years and commencing about 1946 the railroads generally had sustained, and were continuing to sustain, serious and unavoidable losses in connection with their passenger service notwithstanding successively authorized increases in passenger fares.[4] The authorized interstate increases having been determined in that manner, the Commission was fully justified in determining in the same way the increases required in Florida intrastate rates for the removal of undue and unlawful discrimination against interstate commerce within the meaning of Section 13(4).

5. The passenger deficits incurred by the Florida railroads, although substantial in amount, were in no way out of line with the passenger deficits of other railroads generally throughout the south and such deficits had been incurred in connection with intrastate, as well as interstate, operations. Losses from passenger operations rep-

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[3] *Wisconsin R.R. Comm.* v. *C., B. & Q. R. Co.*, 257 U.S. 563.
United States v. *Louisiana*, 290 U.S. 70.
New York v. *United States*, 257 U.S. 591.

[4] *Increased Railway Rates, Fares and Charges, 1946*, 266 I.C.C. 537, 605.
Increased Freight Rates, 1947, 270 I.C.C. 403, 424.

resent a condition which bears alike upon both intrastate and interstate rates. Unless passenger operating losses may be recouped by increases in intrastate freight rates, so long as such increased rates are not unreasonable, an added burden will thereby be imposed upon interstate shippers of freight.

6. The Commission made all findings appropriate and necessary for the support of the order here complained of, including a finding that the intrastate freight rates as increased were not excessive or unreasonable, and such findings are supported by evidence as fully summarized and reviewed in the Commission's report.

7. In conformity with the admonitions of this Court in similar proceedings, the Commission accompanied its findings with a saving clause expressly reserving to any interested party or parties the right to apply for modification of the findings as to any specific intrastate rates or charges.

ARGUMENT

I

The Order Made by the Commission Was Necessary for the Fulfillment of the Duty Imposed Upon That Body by the 1940 Declaration of National Transportation Policy and Sections 15a(2) and 13(4) of the Interstate Commerce Act.

During the period 1946-1948, in proceedings known as Ex Parte No. 162, *Increased Railway Rates, Fares and Charges, 1946*, 266 I. C. C. 537 (hereinafter referred to as "Ex Parte No. 162"), and Ex Parte No. 166, *Increased Freight Rates, 1947*, 269 I. C. C. 33, 270 I. C. C. 81, 270 I. C. C. 93, and 270 I. C. C. 403 (hereinafter referred to as "Ex Parte No. 166"), the Commission, acting in pursuance of the authority and duty vested in it by Sections 13(2) and 15a(2) of Part

I, Interstate Commerce Act (U. S. C. Title 49, Sections 13(2) and 15a(2)), and by the declaration of National Transportation Policy which now constitutes a preliminary part of said Act (54 Stat. 899, 49 U. S. C. 4281), conducted successive general investigations of the interstate freight rates and charges of the railroads throughout the United States.[5] Upon a showing by the railroads of rapidly mounting operating costs, due particularly to repeated increases in wage costs, increased costs of materials and supplies and increased taxes, and the urgent need of revenue to enable them to maintain adequate transportation service, the Commission authorized successive general percentage increases in basic interstate freight rates and charges, with increases in varying amounts on certain particular commodities:

In the first proceeding, Ex Parte No. 162, the Commission made the following finding:

> "1. It is requisite for the carrying out of the purpose of the national transportation policy, and the development, coordination, and preservation of a national transportation system adequate to meet the needs of commerce, the postal service, and the national defense, and in order that freight rates and charges shall be such as to move the greatest volume of traffic,

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[5] By the 1940 declaration of "National Transportation Policy" (49 U.S.C. 4281) Congress has directed, as the rule of rate making to be observed by the Commission, that all of the provisions of the Interstate Commerce Act shall be administered

> "to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

By Section 15a(2) of the Act the Commission is directed, in the exercise of its power to prescribe just and reasonable rates, to give due consideration

> "to the need in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest economical, and efficient management, to provide such service."

while providing adequate and efficient transportation at the lowest cost consistent with the furnishing of such service, and to enable the petitioning carriers by railroad and by water under honest, economical, and efficient management to provide such service, that there be substantial increases in the basic freight rates and charges of the petitioners, and the continued maintenance of the present temporarily increased basis of passenger fares and charges."

Increased Railway Rates, Fares and Charges, 1946, 266 I. C. C. 537, 614.

The increase thus authorized in Ex Parte No. 162 was a general increase of 20 percent in basic interstate freight rates and charges throughout the United States, with increases in different amounts in the case of certain individual commodities.

In the second proceeding, Ex Parte No. 166, upon a showing by the railroads that they had been confronted with additional and substantial increases in wages of employees, as well as further increases in costs of materials and supplies and taxes, the Commission on account of the emergency of the situation at first authorized immediate additional increases (generally 10 percent) in interstate freight rates and charges which were in the nature of interim increases to continue pending completion of the investigation. In authorizing such emergency interim increases the Commission stated in the Ex Parte No. 166 report of October 6, 1947:

"We are fully conscious of the fact that freight rates must be paid by shippers and receivers of freight and ultimately borne by the commerce of the country. It is clear to us, however, that increasing costs of operation now pose, and unchecked will continue to pose, a serious threat to the maintenance of adequate transportation service; that the railroads as a whole, and many of the most important railroads of the country in

particular, are definitely facing such a threat at the present time; that the public vitally needs an efficient transportation service, and imperatively demands a transportation system that is adequate for the national defense in any emergency."

Increased Freight Rates, 1947, 269 I. C. C. 33, 53.

In the second report in the same proceeding the 10 percent interim increase previously authorized was raised to an interim increase of 20 percent (270 I. C. C. 81). In the third report (270 I. C. C. 93) the interim increases were superseded by general percentage increases varying in amount in the different territorial divisions of the country, the increase authorized within the South, i. e., the territory generally described as lying south of the Ohio and Potomac Rivers and east of the Mississippi River, being 25 percent, with certain variations as to particular commodities. In the fourth and final report in Ex Parte No. 166 the general increase of 25 percent for the South was continued, but various modifications were made in the authorized increases in rates on individual commodities (270 I. C. C. 403).[6]

The increases successively authorized were accordingly made effective by the railroads in respect to the interstate rates throughout the United States, including the interstate rates applicable between points in the state of Florida and

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[6] Thereafter, in Ex Parte No. 168, *Increased Freight Rates, 1948*, 276 I.C.C. 9, the Commission, on account of the continuing rise in railroad operating expenses subsequent to Ex Parte 162 and Ex Parte 166, authorized another and further general increase in interstate freight rates and charges, including an increase of 10 percent within southern territory, with certain exceptions. However, at the time of the hearing in *Increases in Florida Intrastate Rates*, Docket No. 30140, the Florida Commission had not passed upon the rail carriers' application for authority to make corresponding increases in Florida intrastate rates and said Ex Parte 168 increases were not included in or covered by the proceeding before the Commission nor are they involved here. This case relates to Ex Parte 162 and Ex Parte 166 increases only.

points in other states, as well as elsewhere throughout the South.

In both the Ex Parte No. 162 and Ex Parte No. 166 proceedings, above referred to, the Commission in its consideration of the revenue needs of the railroads dealt throughout with the results of operations as a whole, including both freight and passenger operations. In recognition of the fact that railroad revenues are derived to a substantial extent from intrastate traffic in the several states, the Commission also took into account the revenue derivable from both intrastate and interstate operations for the purpose of determining the amounts of the authorized rate increases and estimating the anticipated increase in railroad revenues to be derived therefrom. Anticipating that the various state commissions would be requested to permit corresponding increases in intrastate rates, a designated committee of cooperating state commissioners was invited to and did sit with the Commission during the hearings and at the oral arguments and thereafter participated in its deliberations.

In the final report in Ex Parte No. 166 it was stated that the Committee of Cooperating State Commissioners "authorize us to state that they concur in the foregoing report." *Increased Freight Rates, 1947*, 270 I. C. C. 403, 463. In the same report it was also said (p. 440):

> "Considering the entire record upon this feature of the proceeding, we conclude that the orders heretofore entered, *especially when action by the State authorities is finally completed upon the carriers' proposals*, meet the emergency needs of the petitioning carriers, as shown by the record, supplemented by examination of the reports and returns which we are privileged to use under the general stipulation." (Emphasis supplied.)

The commissions of various states—including, among others, the states of Alabama, Tennessee, Texas and Ari-

zona, as well as Florida—thereafter failed and refused to sanction increases corresponding fully with the authorized interstate increases.[7] The Florida Railroad and Public Utilities Commission refused, in respect to all Florida intrastate traffic, to permit the final Ex Parte No. 166 increase of 25 percent and authorized instead a general increase of only 20 percent. On various particular commodities and classes of traffic both the Ex Parte No. 162 and Ex Parte No. 166 increases were either denied altogether or were authorized in amounts less than the corresponding increases in the interstate rates applicable to and from points in Florida.[8] In the report which accompanied the order here complained of the Commission found and stated that the resulting differences between the authorized intrastate and interstate increases meant a difference in and loss of revenue to the Florida railroads in an estimated amount of *more than $915,325.00 per annum*, and that the great preponderance of this severe loss fell upon the three principal railroads operating in Florida, namely, Atlantic Coast Line, Seaboard Air Line and Florida East Coast Railway. *Increases in Florida Intrastate Rates*, 278 I. C. C. 41, 65 (R. 109, 110).[9]

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[7] Proceedings under section 13 relating to the intrastate rates in the other states above referred to were instituted and are reported as *Increases in Alabama Freight Rates and Charges*, 274 I.C.C. 439; *Increases in Tennessee Freight Rates and Charges*, 272 I.C.C. 625; *Texas Intrastate Rates*, 273 I.C.C. 749; *Increases in Arizona Freight Rates and Charges*, 270 I.C.C. 105.

[8] The several orders of the Florida Commission appear in the Record at pp. 41, 65, 67.

[9] The Atlantic Coast Line operates in the states of Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida, its system mileage (as of the time of the hearing before the Commission) totaling 5,526 miles of road of which 1,942 miles lay in Florida. The Seaboard Air Line operates in the same six southern states, with system mileage of 4,153 miles of which 1,506 miles are in Florida. The lines of the Florida East Coast Railway lie wholly within Florida and embrace a total of 575 miles of road. The lines of these three railroads collectively penetrate practically all portions of the state. Other railroads having a comparatively small

From the foregoing it appears that the authorities of the state of Florida were not alone in denying rate increases but that similar action was taken by the commissions of various other states, including the southern states of Alabama and Tennessee which are served in part by the same railroads that serve the state of Florida. If the state commissions throughout the country are to be permitted to require at will substantial departures, with resulting substantial denials of railroad revenue, from the general basis of freight rates found by the Commission to be necessary for the maintenance of an adequate national transportation system—such basis having been determined as in this instance with the cooperation and approval of representatives of the state commissions as a whole, and in anticipation of corresponding increases in the intrastate rates—it must follow inevitably that the power of the Commission to administer the Interstate Commerce Act and the National Transportation Policy as declared by Congress will be virtually emasculated and destroyed. The order here complained of was necessary for the fulfillment of the statutory duty and authority vested in the Commission.

II

The Commission's Authority and Duty Under Section 13(3)(4) to Require the Raising of Intrastate Railroad Rates, for the Removal of Undue and Unlawful Discrimination Against Interstate Commerce, Is Well Settled by the Decisions of This Court.

The general principles governing the Commission's statutory authority and duties relating to intrastate rail-

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amount of mileage in Florida include such roads as the Louisville & Nashville R.R., 243 miles; Georgia Southern & Florida Ry., 157 miles; and St. Louis-San Francisco Ry., 47 miles, the lines of these three last-named roads extending southward into Florida from the northern boundary of the state (R. 176, 211).

road rates have heretofore been set forth in numerous decisions of this Court, including among others the following:

Wisconsin R. R. Comm. v. *C., B. & Q. R. Co.*, 257 U. S. 563;
New York v. *U. S.*, 257 U. S. 591;
U. S. v. *Louisiana*, 290 U. S. 70;
Alabama v. *U. S.*, 283 U. S. 776;
Georgia Pub. Serv. Comm. v. *U. S.*, 283 U. S. 765;
Ohio v. *United States*, 292 U. S. 498;
Illinois Com. Com. v. *U. S.*, 292 U. S. 474;
Florida v. *U. S.*, 282 U. S. 194;
Florida v. *U. S.* 292 U. S. 1;
North Carolina v. *U. S.*, 325 U. S. 507.

No extensive discussion of these decisions is believed to be necessary. Suffice it to say, these decisions hold that section 13(3)(4) confers upon the Commission the power and duty to deal with rates, fares or charges "made or imposed by authority of any state" upon a finding that such rates, fares or charges bring about either or both of two separate and distinct situations, both of which are declared to be unlawful:

1. Any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand. This is sometimes referred to as "persons-localities" preference or prejudice;

2. Any undue, unreasonable, or unjust discrimination against interstate or foreign commerce. This is sometimes referred to as "revenue discrimination against interstate commerce."

Upon a finding, after full hearing, that the rates, fares or charges made or imposed by state authority cause *either* or

both of the things thus declared to be unlawful, the Commission is *required* by the terms of the statute to prescribe

> "the rate, fare, or charge, or the maximum or minimum or maximum and minimum thereafter to be charged, * * * in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination."

In the first of the two situations declared to be unlawful the question is one of the relationship between the intrastate and the interstate rates, fares or charges. *Florida* v. *United States*, 282 U. S. 194, 214. In the second situation declared to be unlawful the question is one of the relationship of the rates, fares or charges to revenue, and the Commission has full authority to regulate intrastate rates, fares or charges for the purpose of protecting the general revenues of the carriers needed for the maintenance of an adequate national railway system. *Florida* v. *United States*, *supra*.

In the case just cited the Court, speaking through Mr. Chief Justice Hughes, stated (282 U. S., p. 212):

> "The authority granted by section 13(4) is thus to be considered in the light of the affirmative duty of the Commission to fix rates and to take other important steps to maintain an adequate national railway system.
>
> "As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the act requires that intrastate traffic should pay 'a fair proportionate share' of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates, as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it."

In the leading case of *Wisconsin R. R. Comm.* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, the Court said (p. 585):

"Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty percent of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. *The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system.*" (Emphasis supplied.)

To the same effect is what was said by Mr. Chief Justice Hughes and Mr. Justice Stone in the more recent cases of *United States* v. *Louisiana*, 290 U. S. 70; *Florida* v. *United States*, 292 U. S. 1; and *Illinois Commerce Commission* v. *United States*, 292 U. S. 474. In the case last cited it was said:

"The scope and application of section 13(4) have so recently been fully considered in opinions of this Court in United States v. Louisiana, 290 U. S. 70, 78 L. Ed. 50, 54 S. Ct. 28; Florida v. United States, No. 342, decided April 2, 1934 [292 U. S. 1, ante, 1077, 54 S. Ct. 603]; see also Georgia Pub. Serv. Commission v. United States, 283 U. S. 765, 75 L. Ed. 1397, 51 S. Ct. 619; Florida v. United States, 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119, that it is unnecessary to repeat that discussion here. Under section 13(4) of the Interstate Commerce Act, the Interstate Commerce Commission is given plenary power to remove the discrimination created by intrastate rates against interstate commerce, by raising intrastate rates so that the intrastate traffic

may produce its fair share of the revenue required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service."

In *North Carolina* v. *United States*, 325 U. S. 507, which concerned an order of the Commission relating to the intrastate passenger fares of North Carolina railroads, the Court again clearly recognized this power of the Commission to deal with intrastate rates, but it was also pointed out that there are requirements surrounding the exercise of such power by the Commission, one of which is that the order must be supported by all appropriate and necessary findings. Speaking through Mr. Justice Black, the Court said (p. 511):

"The power of the Interstate Commerce Commission with reference to such intra-state rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. American Exp. Co. v. South Dakota, 244 U. S. 617, 625, 61 L. Ed. 1352, 1358, 37 S. Ct. 656, P.U.R. 1917F 45. A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet 'a high standard of certainty.' Illinois C. R. Co. v. State Pub. Utilities Commission, 245 U. S. 493, 510, 62 L. Ed. 425, 438, 38 S. Ct. 170, P.U.R. 1918C 1279. Before the Commission can nullify a state rate, justification for the 'exercise of the federal power must clearly appear.' Florida v. United States, 282 U. S. 194, 211, 212, 75 L. Ed. 291, 301, 302, 51 S. Ct. 119. See also Yonkers v. United States, 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327. And the intention to interfere with the state's rate-making function is not to be presumed, Arkansas R. Commission v. Chicago, R. I. & P. R. Co., 274 U. S. 597, 603, 71 L. Ed. 1224, 1228, 47 S. Ct. 724; nor must its intention in this respect be left in serious doubt. Illinois Commerce Commission v. Thomson,

318 U. S. 675, 684, 685, 87 L. Ed. 1075, 1081, 1082, 63 S. Ct. 834. The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intrastate rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission."

In the same opinion the Court further said (325 U. S., p. 516):

> "But the question posed by the Commission's conclusion was whether the particular North Carolina railroads were obtaining from North Carolina's intra-state passenger rates their fair part of such funds as were required to enable these particular railroads to render adequate and efficient service."

And further (at p. 520):

> "The purpose of the National Transportation Law is to assure railroads a fair net operating income and no more. Dayton-Goose Creek R. Co. v. United States, 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A.L.R. 472. The power of the Commission to require states to raise their intrastate rates depends upon whether intra-state traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to *yield a fair return on the value of property directed to the transportation service* both interstate and intrastate. United States v. Louisiana, 290 U. S. 70, 75, 78 L. Ed. 181, 185, 54 S. Ct. 28. But the Commission cannot 'require intra-state rates to be raised above a reasonable level.' United States v. Louisiana, supra (290 U. S. 78, 78 L. Ed. 181, 54 S. Ct. 28)." (Italics the Court's.)

It is well settled also that the Commission is the duly constituted fact-finding body and its findings of fact, if supported by substantial evidence, are not subject to review.

As was said in *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, at page 547:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, *but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.*" (Emphasis supplied.)

In *Florida* v. *United States*, 292 U. S. 1, in dealing specifically with findings by the Commission of undue discrimination under section 13(4) of the Act, the Court stated, at page 12:

> "The question of the weight of the evidence was for the Commission and not for the court. The authority conferred upon the Commission by section 13(4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body. Shreveport Case (Houston, E. & W. T. R. Co. v. United States), 234 U. S. 342, 351, 354, 355, 58 L. Ed. 1341, 1348,

1349, 1350, 34 S. Ct. 833; Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. Ed. 371, 42 S. Ct. 232, 22 A.L.R. 1086, supra. The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. United States v. Louisville & N. R. Co., 235 U. S. 314, 320, 59 L. Ed. 245, 250, 35 S. Ct. 113. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. *In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission.*" (Emphasis supplied.)

As was said also by Mr. Justice Roberts in *Ohio* v. *United States*, 292 U. S. 498, 506, which was a proceeding arising under section 13(3)(4) of the Act:

> "In effect, we are asked to re-examine the evidence, appraise it, and hold the Commission erred in its judgment as to the facts. *We have often said that we have no such power.*" (Emphasis supplied.)

In *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, it was said in the opinion by Mr. Justice Jackson (p. 512):

> "Each of the findings of fact by the Commission appears to be supported by substantial evidence. The court below has not found to the contrary, nor do we."
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> * * * * * * *
>
> "'Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a

presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.' Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 602, ante, 333, 64 S. Ct. 283."

See also

Virginian R. Co. v. *United States*, 272 U.S. 658, 665.
United States v. *Berwind-White Coal Min. Co.*, 274 U.S. 564, 580.
Western Paper Makers' Chemical Co. v. *United States*, 271 U.S. 268, 271.
Interstate Commerce Commission v. *Louisville & N. R. Co.*, 227 U.S. 88, 100.
Helvering v. *National Grocery Co.*, 304 U.S. 282, 294.
Federal Power Comm. v. *Nat. Gas Pipe Line Co.*, 315 U.S. 575, 586.

III

In Ordering a Raising of Florida Intrastate Freight Rates, for the Removal of Undue and Unlawful Discrimination Against Interstate Commerce, the Commission Properly Considered the Revenues of the Florida Railroads from All Operations, Both Freight and Passenger.

1.

Both freight and passenger operations and revenues were considered by the Commission when authorizing the general increases in interstate freight rates.

There can be no dispute about the fact that in both the Ex Parte No. 162 and Ex Parte No. 166 proceedings the Commission, in authorizing general increases in interstate freight rates throughout the United States for the purpose of providing needed railroad revenue, dealt throughout with railroad revenues *as a whole*, as derivable

from both freight and passenger operations. The Commission duly took into account the deficits from passenger operations which began to be incurred following the war years and thereafter continued in increasing amount notwithstanding successively authorized increases in passenger fares. In the report of August 5, 1946 in Ex Parte No. 162 it was stated (*Increased Railway Rates, Fares and Charges, 1946*, 266 I.C.C. 537, at p. 606):

> "A tentative separation made by the petitioning railroads of operating revenues and expenses, estimated, for 1946 and 1947, as between the freight and passenger services indicates an expected deficit in net railway operating income from passenger service of $83,000,000 in 1946, and $445,000,000 in 1947."

In the report of July 27, 1948 in Ex Parte No. 166 (*Increased Freight Rates, 1947*, 270 I.C.C. 403, at pp. 424, 425), it was said:

> "Prior to 1942, railroad passenger service was generally operated at a deficit, but during the war years, 1942-1945, substantial earnings were derived therefrom, primarily because of the large and unprecedented volume of passenger transportation incident to the war. Since the close of hostilities travel has substantially declined, although it is still greater than in any previous peacetime period. This decline, coupled with rapidly increasing operating expenses and taxes, has again produced a revenue deficit from the railroad passenger service."

There then followed in the report a reference to the various increases theretofore authorized by the Commission in passenger fares.

Thereafter, in Ex Parte No. 168, *Increased Freight Rates, 1948*, 276 I.C.C. 9, at pages 32 to 40, inclusive, the Commission reviewed at length the entire subject of "passenger deficits" and after referring to some of its earlier de-

cisions, as well as such court cases as the *Minnesota Rate Cases*, 230 U.S. 352, *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U.S. 585, and *Norfolk & W. Ry. Co.* v. *Conley*, 236 U.S. 605, it was said (276 I.C.C., p. 35):

> "In *Fifteen Percent Case, 1931*, a general revenue case, 178 I.C.C. 539, 564-5, citing the *Northern Pacific* and *Norfolk & Western* decisions of the Supreme Court, and following *Revenues in Western District, supra*, we said:
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> > 'It is not our view that these cases prevent the imposition of a burden upon one form of service to compensate for an inevitable deficiency in earnings of another form of service performed by the same carrier. * * * However, the earnings of the particular service in question are entitled to consideration in the fixing of reasonable rates.'
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> "In *Fifteen Percent Case, 1937-1938*, 226 I.C.C. 41, 54, which was another general freight increase proceeding, we said:
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> > 'The interrelation of the freight and passenger traffic has often been commented on by us, and we have declined to accede to the proposition again repeated here by certain protestants that we can authorize no increase in freight rates to correct deficiencies in aggregate earnings growing out of the inability of the passenger business to meet its full share of the revenue burden. *Revenues in Western District*, 113 I.C.C. 3, 22-23; *Fifteen Per Cent Case, 1931*, 178 I.C.C. 539, 565; compare *General Commodity Rate Increases, 1937, supra*. [223 I.C.C. 657.]'
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> "These cases are typical of our more recent holdings upon this question. While we regard it as 'trite to say that each particular service, coach, sleeper, parlor car, and head end, should as nearly as may be pay its own way and return a profit' (*Eastern Passenger Fares in Coaches*, 227 I.C.C. 17, 25), and we

have accepted the contention that there may be traffic that should not be burdened with a shortage of passenger service return (*Livestock, Western District Rates*, 190 I.C.C. 611, 629), yet, if passenger service inevitably and inescapably cannot bear its direct costs and its share of joint or indirect costs, we have felt compelled in a general rate case to take the passenger deficit into account in adjustment of freight rates and charges. Both the freight and passenger services are essential, and revenue losses or deficits on the one necessarily must be compensated by earnings on the other if the carriers are to continue operations. Both may be subjected to reasonable rates and charges to produce the fair aggregate return, even though thereby a higher rate of return may be exacted from the one than from the other. (*Property Owners' Committee* v. *Chesapeake & O. Ry. Co.*, 237 I.C.C. 549, 565.)"

The Commission also pointed out that conditions had changed since the time of its earlier decisions, such as the *Five Percent Case*, 31 I.C.C. 351 (decided in 1914), it being stated (276 I.C.C., p. 34):

> "However, because of changed theories adopted by Congress in the Transportation Act, 1920, and because as a practical matter the increasing degree of unprofitableness of the passenger traffic *menaced the continuity of an adequate national system of transportation*, we were forced to a more comprehensive view of this question. We observe, also, that at the time of those decisions the railroads enjoyed a practical monopoly in supplying transportation, but that situation no longer exists." (Emphasis supplied.)

It was further noted in the same report that the passenger service deficits of the railroads are by no means assignable entirely to the carriage of passengers, since the railroads engage extensively in the transportation in passenger trains of "physical things or commodities" such as

baggage, mail, express and milk, the expense of which has been borne by the passenger service and not by the freight service; that such transportation of things in passenger service had shown, as nearly as could be ascertained, a net operating deficit in every year from 1936 through 1948; and that such deficit "has been steadily, though irregularly, increasing"; and it was then stated (276 I.C.C., p. 39):

> "Much of the burden of the passenger service deficit, therefore, is apparently quite unrelated to the carriage of passengers, with perhaps some qualification for baggage. Instead, it is attributable to the transportation of commodities which move in passenger trains instead of freight trains, not because of any essential difference in the character of the commodities or things carried in the freight and passenger services but primarily for reasons of expedition of service."

It thus appears that in a long line of decisions, including *Fifteen Percent Case, 1931*, 178 I.C.C. 539, *Fifteen Percent Case, 1937-1938*, 226 I.C.C. 41, and including also Ex Parte No. 162 and Ex Parte No. 166, as well as the more recent Ex Parte No. 168, *Increased Freight Rates, 1948*, 276 I.C.C. 9, the Commission, when authorizing successive general increases in *interstate* freight rates, has dealt with railroad operations as a whole, including both freight and passenger, and has taken fully into account the matter of passenger deficits. The successively authorized general increases in the interstate freight rates were made effective by the railroads and the interstate rates throughout the country, including the interstate rates to and from points in Florida, continue to reflect such general increases. When such increases were authorized in Ex Parte No. 162 and Ex Parte No. 166 neither the Florida Railroad and Public Utilities Commission nor any other parties to those proceedings undertook to question in the courts the validity of the Com-

mission's action or the propriety of its procedure, although they had every opportunity to do so had they so elected.

Appellants are here contending, however, that the Commission was not justified in similarly taking into account the passenger deficits of the Florida railroads when directing a raising of Florida intrastate freight rates pursuant to the provisions of section 13(3)(4).

2.

The Commission properly took into account the passenger deficits of the Florida railroads when directing an increase in Florida intrastate freight rates under the provisions of section 13(3)(4).

In the report which accompanied the order here complained of the Commission, under the caption "Passenger Deficits", again referred to its prior decisions upon this subject, including Ex Parte No. 168, and it was then stated (*Increases in Florida Intrastate Rates*, 278 I.C.C. 41, at p. 67, R. 112):

> "Increased passenger deficits, by reason of the continuing rise in operating expenses and the growing use of other forms of transportation, is a condition bearing alike upon intrastate and interstate rates. There is here no claim or showing that the passenger deficits of the respondents do not result from intrastate as well as interstate operations, and the passenger deficit of the East Coast, which operates entirely within Florida, would appear to indicate to the contrary.
>
> "The record affords no justification for a difference in treatment in this respect between Florida intrastate traffic, on the one hand, and interstate traffic to and from Florida, on the other hand. The question of passenger deficits is a serious one for both carriers and shippers, *and would become even more serious for interstate shippers if this burden were imposed entirely upon them.*" (Emphasis supplied.)

As the Commission here pointed out, such passenger deficits as the Florida railroads have incurred have arisen in connection with the intrastate and interstate operations alike of these railroads. And if the intrastate traffic in Florida should be relieved from participation in this loss a correspondingly greater burden would thereby be imposed upon the interstate traffic. It is obvious also that the same increases in wage costs and costs of materials, supplies and taxes, which were the immediate cause of the railroads' petitions for general rate increases in Ex Parte No. 162 and Ex Parte No. 166, bore alike upon the passenger as well as freight operations of the railroads, including both interstate operations and intrastate operations in Florida.

There has been no showing here that the passenger deficits of the Florida railroads, although substantial in amount, were disproportionate or out of line with the passenger deficits of other southern railroads. In the report in *Increased Freight Rates, 1948, supra*, it was noted (276 I.C.C. at p. 40) that in 1948 the railroads in the Southern Region as a whole showed a passenger service operating ratio, *i.e.*, ratio of operating expenses to revenues, of 127.2 percent. In the same year the corresponding figures for the three principal Florida railroads were, for the Atlantic Coast Line 127 percent; for the Seaboard Air Line 128 percent; and for the Florida East Coast Railway 120 percent (Ex.No. 1, Sch. 30, 31, R. 208, 596, 597; Ex. No. 170, R. 820A, 231).

There has likewise been no suggestion in this record that the continued maintenance of adequate passenger service by the Florida railroads is not a matter of importance to the people of Florida. As the Commission observed in *Increased Freight Rates, 1948, supra* (276 I.C.C., p. 35), "both the freight and passenger services are essential." We suppose it will hardly be disputed that adequate passenger

service—particularly the through interstate train service between northern points and Florida whereby thousands of visitors are transported annually to and from the state—is advantageous to the interest of the state as a whole. Neither have appellants undertaken to deny that the Florida railroads, in common with other railroads throughout the country, have been making every effort to reduce passenger operating losses by discontinuing unprofitable and unnecessary trains wherever practicable, as well as by other means.[10] Their passenger fares have also been established necessarily with the view of holding the traffic to the railroads and avoiding its diversion to other and competing forms of transportation.

Appellants particularly emphasize and rely upon alleged excessive, although greatly exaggerated, rates of return said by them to be derived by the Florida railroads from their freight service standing alone.[11] It is hardly neces-

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[10] In *Increased Freight Rates, 1948*, 276 I.C.C., at p. 36, it is stated:

> "Indicative of the increase in unprofitableness of the passenger service, and also of the drastic remedies taken by the railroads to counteract the drain on their net revenue, is the fact that passenger service has been abandoned completely on many thousands of miles of railroads. Between the end of 1923 and the beginning of the present year, the miles of line operated in passenger service of the class I roads decreased from 224,762 to 159,373, a total of 65,389 miles, or 29.1 percent in 26 years. A small portion only of this service has been replaced by rail-owned bus lines. In addition to total abandonments, much curtailment of service has occurred, which is impossible to portray statistically."

[11] Exhibits filed by witness Pettijohn, representing the Florida Commission (Nos. 66 and 67, R. 313, 771), purport to show that the Florida East Coast Ry. earned a return from freight operations of 8.2288 per cent in 1947 and in 1948 a return of 12.3538 percent. The exhibits are not only erroneous but are also based upon purely arbitrary apportionments. For example, witness Pettijohn shows for the F.E.C. Ry. an investment in railroad property used in transportation service of $76,101,014 in 1947 and $75,595,884 in 1948. The correct figures are *$97,349,387* and *$97,610,284*, respectively, as taken from F.E.C. Ry's annual reports to the Commission and shown in Ex. No. 1, Sch. 3 (R. 201, 575). Witness Pettijohn also makes an arbitrary and unexplained assignment of property invest-

sary, however, to point out that any such attempted computation of rates of return, freight versus passenger, involves purely arbitrary assumptions respecting the extent to which roadway and other railroad facilities are used by the freight and passenger services, respectively. It is unquestionably true also that even if passenger operations should be discontinued entirely a very substantial portion of property investment which might otherwise be assignable to passenger service would still have to be continued and assigned to freight. Especially is this so in the case of the Florida railroads whose freight traffic, as is well known, consists to a large extent of perishable fruits and vegetables, which require and receive a special type of freight service in trains that are operated on exceptionally fast schedules with resulting greater strain upon roadway and equipment.

The record here discloses that the urgent need of these railroads for additional revenue, like the need of other railroads throughout the country, was brought about to a substantial extent by reason of severe passenger operating losses, as well as by reason of increases in wage costs, costs of materials and supplies and taxes. But the Commission, as we have pointed out above, necessarily considered the earnings of these Florida railroads from operations *as a whole* for the purpose of ascertaining "the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property directed to the transportation service both interstate and intrastate" (*North Carolina* v. *United States*, 325 U.S., p. 520). The Commission dealt with such railroad revenues as a whole when determining the needed increases in interstate rates, includ-

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ment to freight and passenger operations, respectively. In 1948 this apportionment is made on practically a 50-50 basis, while in 1947 about 57 percent is assigned to freight. The exhibits above referred to were offered during the hearing before the Commission, but the Commission made no such findings as these exhibits purport to substantiate.

ing the interstate rates to and from points in Florida. It was clearly justified in determining in the same way the needed increase in the intrastate rates of the Florida railroads.

The general rate increases authorized by the Commission in the Ex Parte No. 162 and Ex Parte No. 166 proceedings were directed to the end of developing and preserving the national railway transportation system, the maintenance of which the Commission had found to be dangerously threatened on account of the increased operating costs and declining revenues of the railroads. The increases in Florida intrastate rates as thereafter required by the Commission were likewise directed to the preservation of the national railway transportation system, of which the railroads serving the State of Florida constitute an important part. If the Commission, in dealing alike with the interstate rates and the intrastate rates in Florida, is without authority to consider railroad revenues in their entirety, including both freight and passenger revenues, it must follow inevitably that the Commission will be powerless to carry out the mandate of the statute.[12] And if continuing

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[12] In *Sixty-Fifth Annual Report of the Interstate Commerce Commission* (Nov. 1, 1951) it was stated (p. 5):

> "The drain which the passenger-train service deficit makes on freight revenues was an important factor in our decision in Ex Parte No. 175, above, as it has been in other revenue proceedings."

It was further stated (p. 41):

> "The deficit in passenger-service revenues of class I railroads, computed from carrier reports on the basis of our prescribed formula, declined from $649.6 million in 1949 to $508.5 million in 1950. The carriers' 1950 passenger-service revenues were augmented, however, by about $149,000,000 of retroactive mail pay, $107,000,000 of which was applicable to the period February 19, 1947–December 31, 1949, and about $42,000,000 to the calendar year 1950. If the $107,000,000 is deducted from the 1950 revenues from passenger and allied services, the deficit for those services would amount to $615.5 million for 1950. An adjusted figure for 1949 is not available. With few exceptions, and to varying degrees, all railroads report deficits in these operations."

and unavoidable losses from passenger service may not be offset by increases in freight rates, so long as neither the interstate nor intrastate rates are raised to an unreasonably high level, the continued maintenance of an adequate national transportation system may well become a practical impossibility. Any railroad might conceivably become bankrupt because of irremovable passenger deficits although it could be saved by the application of freight rates which, although higher than they otherwise might be, can not be said to be unfair or unreasonable. Such question of reasonableness is one for determination by the Commission and upon this question the Commission's ultimate findings herein, upon the evidence of record,[13] contain the following as Finding No. 3 (*Increases in Florida Intrastate Rates*, 278 I. C. C., p. 72, R. 118):

> "3. That the present interstate freight rates and charges within Florida and between points in Florida and points in other States are just and reasonable, including those proposed within Florida in I. and S. No. 5640, to the extent above found just and reasonable; *and that intrastate rates, charges, and minimum weights herein approved will not exceed a just and reasonable level.*" (Emphasis supplied.)

3.

Appellants' contention is unsupported by either Commission or court decisions.

The decisions of this Court in such cases as *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, and *Norfolk & W. Ry. Co.* v. *Conley*, 236 U. S. 605, cited and relied upon by appellants, clearly lend no support to appellants' contention here. Those cases (decided in 1915) both related to the

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[13] Further reference to the evidence relating particularly to the matter of reasonableness is made at pp. 41-44, *infra*.

alleged confiscatory nature of transportation charges prescribed by state authority. In the *Northern Pacific* case the Court, adhering to well established principles, held that the state of North Dakota could not justify the imposition by statute of charges for the transportation of lignite coal, such charges having been shown to yield revenue less than or barely equal to the computed cost of the transportation of that traffic, upon the theory that the railroad was deriving adequate revenues from its intrastate business as a whole. As was said in the opinion by Mr. Justice (later Chief Justice) Hughes, 236 U. S., at p. 599:

> "Frequently, attacks upon state rates have raised the question as to the profitableness of the entire intrastate business under the state's requirements. But the decisions in this class of cases (which we have cited in the margin) furnish no ground for saying that the state may set apart a commodity or a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate."

The Court further stated (p. 604):

> "With respect to particular rates, it is recognized that there is a wide field of legislative discretion, permitting variety and classification, and hence the mere details of what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial compensation, are not subject to judicial review. But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire

traffic to which the rate applies, it must be concluded that the state has exceeded its authority."

In the *Norfolk & Western case*, which followed the *Northern Pacific case* and was decided on the same day, the Court similarly held invalid a statute of West Virginia fixing a passenger fare of 2 cents per mile, as to which it appeared that the revenue derived therefrom would be less than the cost of conducting the passenger transportation. The Court said (236 U. S., at p. 609):

> "The passenger traffic is one of the main departments of the company's business; it has its separate equipment, its separate organiaztion and management, and, of necessity, its own rates. In making a reasonable adjustment of the carrier's charges, the state is under no obligation to secure the same rate of return from each of the two principal departments of business, passenger and freight; but the state may not select either of these departments for arbitrary control. Thus, it would not be contended that the state might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service. And, on the same principle, it would also appear to be outside the field of reasonable adjustment that the state should demand the carriage of passengers at a rate so low that it would not defray the cost of their transportation, when the entire traffic under the rate was considered, or would provide only a nominal reward in addition to cost. That fact, satisfactorily proved, would be sufficient to rebut the presumption of reasonableness; and if in any case it could be said that there existed other criteria by reference to which the rate could still be supported as a reasonable one for the transportation in question, it would be necessary to cause this to appear. Northern P. R. Co. v. North Dakota, supra, and cases there cited."

No confiscation is alleged in the case here before the Court, which relates solely to questions arising under sec-

tion 13(3)(4) of the Interstate Commerce Act. Moreover, there has been no showing here that the Commission arbitrarily directed a raising of Florida intrastate freight rates to an unreasonably high level. On the contrary, the Commission upon due consideration of the evidence affirmatively found and stated that the Florida intrastate freight rates as a whole were "abnormally low" and that if increased by the amounts directed in the order such rates as so increased would not exceed "a just and reasonable level" (278 I. C. C., p. 72, R. 118).

It may be mentioned also that the cases above referred to were both decided long prior to the 1940 declaration by Congress of the "National Transportation Policy" or the enactment of section 15a(2) of the Interstate Commerce Act in its present form.

Appellants have asserted that the question here raised has never heretofore been presented directly for decision by this Court. It is none the less true, however, that the Court has repeatedly upheld orders of the Commission under section 13(4) similarly directing the raising of intrastate rates where state commissions had refused to sanction increases following authorized general interstate increases, such interstate increases having been determined upon a consideration of revenue needs of the railroads from operations as a whole, including both freight and passenger operations.

In *United States* v. *Louisiana*, 290 U. S. 70, the Court upheld an order of the Commission under section 13(4) whereby it had directed a general raising of the intrastate freight rates of the railroads operating in Louisiana by amounts corresponding with general interstate rate increases theretofore authorized in *Fifteen Percent Case, 1931*, 178 I. C. C. 539, 179 I. C. C. 215. In that proceeding, as in Ex Parte No. 162 and Ex Parte No. 166, the Commission in determining the amounts of the interstate increases had considered the revenue needs of the railroads from the

standpoint of all operations. The Commission particularly mentioned the passenger service operating losses which the railroads were sustaining at that time, it being stated in the first report (178 I. C. C., at p. 584):

> "Foremost among the problems to be solved is that presented by the passenger service. Broadly speaking, this service for the country as a whole fails by something like $450,000,000 annually to contributing its proportionate share toward taxes and return on railroad property. The close similarity of this figure to the amount of money which the carriers estimated that they would realize from the 15 per cent increase, if no loss of traffic resulted, is striking. *In other words, if the carriers were able to conduct the passenger business as profitably as the freight business, they would even now, under adversity in a period of great depression, be earning enough to stabilize their credit situation. The freight business as a whole is doing reasonably well, present conditions considered.*" (Emphasis supplied.)

The situation thus described by the Commission is strikingly similar to that of the Florida railroads as disclosed upon this record.

In *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, the Commission had ordered a raising of the intrastate passenger fares of Wisconsin railroads following the refusal of the Wisconsin Railroad Commission to permit an increase corresponding with a general interstate increase theretofore authorized and made effective in interstate fares. In upholding the order upon the ground of undue discrimination against interstate commerce under section 13(4) the Court stated (p. 565):

> "The Commission had investigated the interstate rates of carriers in the United States, in a proceeding known as Ex parte 74, Increased Rates, 58 Inters. Com. Rep. 220, for the purpose of complying with section 15a of the Interstate Commerce Act, as amended by section

422 of the Transportation Act of 1920 (41 Stat. at L. 488). That section requires that the Commission so adjust rates that the revenues of the carriers shall enable them as a whole or by groups *to earn a fixed net income on their railway property.*" (Emphasis supplied.)

The Court also observed that "twenty per cent of the gross freight receipts of the railroads of the country are from intrastate traffic, and 50 per cent of the passenger receipts" (257 U. S. at p. 585).

Similarly, in *New York* v. *United States*, 257 U. S. 591, the Court upheld an order of the Commission whereby it had directed a general raising of intrastate passenger fares in the State of New York following the refusal of the state commission to permit increases corresponding with the interstate increases theretofore authorized in Ex Parte 74, *Increased Rates, 1920*, 58 I. C. C. 220.

Appellants have cited no decision of either the Commission or the courts which sustains their contention here. As we have pointed out above the Commission, in recognition of changed conditions brought about by subsequent amendments of the governing statute, has long since felt compelled to reconsider conclusions stated in the early *Five Per Cent Case*, 31 I. C. C. 351 (July 29, 1914) cited and relied upon by appellants.

IV

The Commission Made All Findings Appropriate and Necessary for the Support of the Order and Such Findings Are Amply Supported by Evidence.

The ultimate findings of the Commission are set out in the report, which is made a part of the order, and are quoted in full below (278 I. C. C. at pp. 72-74, R. 118):

"Upon the record before us, we find and conclude:

"1. That the interstate transit rates, charges, minimum weights, and rules proposed in I. and S. No. 5646

are just and reasonable, except the proposed minimum of 44,000 pounds from February 1 to September 30. We find that a just and reasonable minimum for that period should not exceed 42,000 pounds.

"In No. 30140, we further find—

"2. That the transportation conditions incident to the intrastate transportation of freight in Florida are not more favorable and such conditions in the Florida peninsula are somewhat less favorable than those (1) within southern territory and (2) between Florida and interstate points.

"3. That the present interstate freight rates and charges within Florida and between points in Florida and points in other States are just and reasonable, including those proposed within Florida in I. and S. No. 5646, to the extent above found just and reasonable; and that intrastate rates, charges, and minimum weights herein approved will not exceed a just and reasonable level.

"4. That there is active competition between localities engaged in interstate commerce between points in Florida and points in other southern States, on the one hand, and localities engaged in intrastate commerce in Florida, on the other hand, and that this competition extends for all practical purposes throughout the entire State of Florida and to class and commodity traffic generally, but not including sugarcane to the mill, molasses, and, for short hauls, mixed fertilizer and a few other commodities.

"5. That the Florida intrastate rates, charges, and minimum weights, which are below the level herein authorized, are abnormally low and are not contributing their fair share to the revenues required by respondents to enable them to render adequate and efficient service and to operate profitably, and thereby accomplish the purpose of the Interstate Commerce Act, and as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense; and

that the burden thus cast upon interstate commerce is undue to the extent that these intrastate rates and charges are less than they would be on the basis herein approved.

"6. That the establishment of intrastate rates and charges increased sufficiently to equal the level herein approved will substantially increase respondents' revenues therefrom, and will constitute not more than a fair proportion of respondents' total income, not taking into consideration the Ex Parte No. 168 increases.

"7. That the maintenance of intrastate rates and charges within Florida on bases lower than those herein approved causes, and in the future will cause, (1) in all instances, unjust discrimination against interstate commerce, (2) in nearly all instances, undue preference of and advantage to localities in intrastate commerce, and undue prejudice to localities in interstate commerce; and (3) undue and unreasonable advantage and preference to intrastate shippers of cement, particularly those at Tampa, Fla., and undue prejudice to interstate shippers, especially those at Clinchfield, Ga.

"8. That this unjust discrimination and undue prejudice should be removed by establishing intrastate rates and charges between points in Florida which will reflect the same increases as are, and for the future may be, maintained by respondents on like interstate traffic to and from Florida, and within Florida under our authorizations in Ex Parte No. 162 and Ex Parte No. 166, modified as herein indicated and as proposed before the Florida Commission in proceedings referred to herein: provided, that, under these findings, (1) on sugarcane, the present Florida intrastate transit rates should be increased to reflect the Ex Parte No. 162 and Ex Parte No. 166 increases but the minimum weights thereon should be the same as the minima authorized in I. and S. No. 5646, and the present high unused Florida intrastate nontransit rates should not be increased, except as necessary to observe as a minimum the Florida intrastate transit rates increased as herein authorized; (2) that on wastewood, the increased intrastate rates, mini-

mum 40,000 pounds, authorized herein, shall alternate with intrastate rates, minimum 60,000 pounds, which latter rates shall not exceed the interstate rates, minimum 60,000 pounds, applicable, from August 21, 1948, to, but not including, January 11, 1949, the effective date of the initial interim increases authorized in Ex Parte No. 168, for corresponding distances from Coast Line stations in Florida to Brunswick, Ga.; (3) that on pulpwood, no increase shall be made in Florida joint-line charges nor in Florida single-line distance rates which would cause those rates or charges to exceed the level of the corresponding rates contemporaneously maintained on interstate traffic during the foregoing period from or to Florida points under the Roanoke Rapids scale; (4) that on fertilizers and fertilizer materials, no increase shall be made in Florida single-line intrastate rates which will cause such rates to exceed the level of the single-line intrastate rates maintained by the Florida East Coast Railway immediately prior to January 11, 1949, the effective date of the initial interim increases authorized in Ex Parte No. 168; (5) that no intrastate rate or charge shall be increased so that it will exceed the lowest level of the corresponding rates or charges contemporaneously maintained generally on interstate traffic to and from Florida points in the period from August 21, 1948, to, but not including, January 11, 1949; and (6) that the foregoing provisions shall be construed so as to make due allowance for differences in minimum weights and for the Florida peninsular arbitraries where applicable."

There is then embodied in the report the following saving clause (278 I.C.C. p. 74, R. 120):

"These findings are without prejudice to the right of the authorities of the State of Florida, or any other interested party, to apply for a modification thereof as to any specific intrastate rates or charges on the ground that they are not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act."

It should here be pointed out that the Commission did not, as appellants say on brief (Appellants' brief p. 16), require a raising of the Florida intrastate rates to the level of the interstate rates. On the contrary, the Commission merely directed that the intrastate rates should be increased by amounts corresponding with the increases theretofore authorized and made effective in the interstate rates applicable to, from or between points in Florida (Finding No. 8).

It may be noted also that in Finding No. 8 the Commission dealt separately with the intrastate rates on certain individual commodities, including sugarcane, pulpwood and several others, and specifically designated the manner and extent to which those particular rates should be increased.

1

The Commission's finding that the intrastate rates, as increased, would not be in excess of a just and reasonable level is supported by evidence.

In the report (278 I.C.C., pp. 45-60, inc., R. 86-104) the Commission dealt separately and extensively with class rates and rates on the various individual commodities which move in volume in Florida, such as agricultural limestone, fertilizer and fertilizer materials, logs, lumber and related articles, phosphate rock, pulpwood, resinous wastewood, sugarcane and others; pointed out the numerous instances in which the interstate rates to and from Florida and elsewhere in the south had been either prescribed or approved by the Commission in other cases and the extent to which the Florida intrastate rates were lower than such prescribed or approved interstate rates; and mentioned numerous comparisons with other rates applicable on the same or similar commodities—all as supporting the ultimate finding:

"3. That the present interstate freight rates and charges within Florida and between points in Florida

and points in other States are just and reasonable, including those proposed within Florida in I. and S. No. 5646, to the extent above found just and reasonable; and that intrastate rates, charges, and minimum weights herein approved will not exceed a just and reasonable level."

It was also stated, at page 59 (R. 102):

"With respect to intrastate rates which with the increases sought by respondents will not be on a higher level than the corresponding interstate rates, the previous discussion herein, relating to the more important commodities, is fairly representative of the relative situation, intrastate compared with interstate, disclosed in the record concerning numerous commodities which move under the rates in issue. Exhibits show in detail the intrastate rates on practically every commodity of any importance moving in Florida as compared with interstate rates for comparable hauls of the same commodities.

* * * * * * *

"To deal with each of the other commodities separately is not essential. It will suffice to find that, so far as appears on this record, the intrastate rates, with the addition of the increases sought on these commodities, will in no instance be on a higher level than the corresponding interstate rates giving due consideration to differences in minima and to the peninsular arbitraries where applicable." [14]

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[14] In *Southern Class Rate Investigation*, 100 I.C.C. 513, 128 I.C.C. 642, as well as numerous decisions dealing with rates on particular commodities, the Commission, in recognition of the relatively high cost of railroad operations in what is commonly known as the Florida peninsula, i. e., that portion of the state which lies south of the Jacksonville-Chattahoochee line of the Seaboard Air Line R.R., has authorized the use of so-called peninsula "arbitraries", the amounts of which are to be added to the basic mileage scales of rates in constructing rates to and from the peninsula and determined by the length of the haul in the peninsula. The Florida Commission has likewise authorized the inclusion of such "arbitraries" in constructing intrastate rates. In the case of numerous rates, both interstate and intrastate, the rail carriers have from time to time "waived" such arbi-

The Commission's findings as to reasonableness are amply supported by evidence, including Exhibit No. 11 (statement of testimony in narrative form, R. 271, 610), Exhibit No. 12 (R. 271, 614), and Exhibits Nos. 13 and 15-21 (R. 272, 682, 685-690). They relate to practically every commodity of which there is an intrastate movement of any consequence in Florida. The Commission was not required to deal separately with each and every rate among the thousands of rates applying between points in Florida. *Georgia Pub. Serv. Commission* v. *United States*, 283 U. S. 765; *United States* v. *Louisiana*, 290 U. S. 70.

In *United States* v. *Louisiana*, 290 U. S., at page 78, the Court, speaking through Mr. Justice Stone, stated:

> "The administrative difficulties which would preclude performance of the duty imposed by section 15a if the Commission were required to find that each individual rate prescribed is just and reasonable, would similarly prevent compliance with that under section 13(4). Since neither can be performed effectively without performance of the other, the standard of reasonableness to which the Commission must conform is necessarily the same under both, and that implies that under section 13 (4), as under section 15a(2), reasonable latitude must be given for modification of particular rates found to be unreasonable.
>
> "The case of the Louisiana rates was not alone before

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traries on account of motor-truck and water-line competition. With respect to those rates which still contain peninsula arbitraries, the Commission stated as follows in its report (278 I.C.C., p. 62, R. 106):

> "These arbitraries were prescribed on interstate class and commodity traffic in numerous interstate proceedings and, in authorizing the general increases under Ex Parte No. 162 and Ex Parte No. 166, no exceptions were made with respect to the numerous rates which were subject thereto. They have been discussed herein at length under the subject of class rates. *The record does not warrant any treatment in regard to rates subject to the peninsular arbitraries different from the treatment in regard to other rates here in issue. The situation in this respect is no different within Florida than from or to Florida.*" (Emphasis supplied.)

the Commission, and it should not be treated as though it were. A number of other states, contesting, in the aggregate, a wide range of rates, were heard at the same time. Had the Commission been required to go into the circumstances of each item with particularity the purpose of its original order would have been defeated. It sufficed that the Commission found that Louisiana showed nothing in the circumstances of its agriculture and industry or its traffic conditions so different from the rest of the country as to lead to the conclusion that the intrastate rates, raised to the reasonable general interstate level, would not themselves be reasonable; and that it saved the rights of interested parties to test the reasonableness of any individual rate."

In both Ex Parte 162 (266 I.C.C., at p. 615) and Ex Parte 166 (270 I.C.C., p. 97) the Commission had found that the interstate rates, to and from Florida and elsewhere within the south, when increased by the amounts of the authorized general increases would not be in excess of a reasonable general rate level. In its report herein the Commission, as we have shown, undertook merely to require similar general increases in the intrastate rates in Florida, which it had found and declared to be "abnormally low" (278 I.C.C., p. 72). It also "saved the rights of interested parties to test the reasonableness of any individual rate."

2

The Commission's findings relating to railroad revenues meet all requirements heretofore announced by this Court in proceedings arising under Section 13(3)(4).

In apparent reliance upon expressions appearing in *North Carolina* v. *United States*, 325 U. S. 507, appellants assert that the Commission arbitrarily failed and neglected to make appropriate findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroads'

total income; as to what amount of revenue was required to enable the railroads to operate efficiently; or a finding that the Florida intrastate rates were less than compensatory or insufficient to cover the full cost of service.

In the *North Carolina case* an order whereby the Commission had directed a raising of the intrastate passenger coach fares of railroads operating in North Carolina was set aside upon the ground, as stated in the opinion, that the order was not shown to be "based on adequate findings, supported by evidence" (325 U. S. p. 520). But the facts of that case are very different from the facts disclosed upon this record. In the *North Carolina case* the Court, in the opinion by Mr. Justice Black, particularly pointed out (325 U. S. p. 519) that at that time the four North Carolina railroads "were carrying more passengers and more freight, and were more prosperous than they had ever been in their history"; that they were "in the highest excess profit tax brackets, and that somewhere between 80 and 90% of all their profits were subject to be paid for federal taxes"; and that a great revenue increase had "transformed a 1936 $16,426.00 deficit of six North Carolina roads, including the four here involved, into a 1942 $26,699,988.00 profit", most of which was shown to have been derived from passenger revenues. The Court then stated:

> "All of this evidence and much more to which we might advert was sufficient to show that the Commission might have found, had it made any findings on the subject at all, that a 1.65 cents rate for these four North Carolina railroads would have been a fair coach passenger contribution to revenues required to enable them to operate profitably and efficiently. But it made no findings on this subject at all. The purpose of the National Transportation Law is to assure railroads a fair net operating income and no more. Dayton-Goose Creek R. Co. v. United States, 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A.L.R. 472."

The Court's expressions concerning the required findings with respect to "discrimination against interstate commerce" are to be considered in the light of the circumstances above described, including the fact that the North Carolina railroads were at that time *in no need of any increase in revenues from any source* so far as the purposes of the national transportation law were concerned.

The record here discloses no such situation in the case of the Florida railroads. With reference to these particular railroads the Commission found, on the contrary, that they were *in dire need* of additional revenue and that their need was even greater than that of other southern railroads generally. Upon this subject the report of the Commission contains the following (278 I.C.C. at p. 65, R. 109):

> "* * * In 1948, the rate of return earned by the principal respondents herein on their property investment, including materials and supplies and cash as of the close of the periods for which computed, averaged 2.29 percent and on such investment less depreciation, 2.91 percent. In 1946, the corresponding figures for the Coast Line were 1.28 and 1.62 percent; those for the Seaboard were 3.91 and 4.91 percent; and those for the East Coast were 3.87 and 4.35 percent, respectively.
>
> "In 1947, without the general increases as made on interstate traffic and on most of the intrastate traffic, a net railway operating income of $13,383,693 earned by these three respondents would have been converted into a deficit of $16,871,215. As stated, the revenue loss as estimated by respondents because of the failure to authorize the increases herein sought is $915,325 a year. Obviously, the great preponderance of this severe loss will fall upon the three principal respondents. The figures include no estimated revenue loss on certain smaller roads in Florida. The estimated loss would have been increased accordingly if such roads had been included. During the first 4 months of 1949, as compared with the corresponding months in 1948, the railway operating income of the principal respondents declined

10 percent, as compared with 7.6 percent for other carriers in the southern region. During this period Federal income taxes of the Coast Line and Seaboard increased $513,000."

Exhibit No. 1 (Schedules 1, 2 and 3, R. 573-575, 201), introduced before the Commission, displays the results of operations over a period of years of the three principal Florida railroads, Atlantic Coast Line, Seaboard Air Line and Florida East Coast Railway, as well as such roads as the Louisville & Nashville, St. Louis-San Francisco Railway and Georgia Southern & Florida Railway, each of which operates a relatively small amount of mileage in Florida. It shows that the Atlantic Coast Line, for example, a carrier which was operating 1,942 miles of road in that state, earned in 1948 a return of *only 1.25 per cent* on its property investment and *only 1.6 per cent* on such investment less depreciation. The Florida East Coast Railway, whose lines lie wholly within Florida, had corresponding rates of return during the same year of only *7.68 per cent* and *4.90 per cent*, respectively. As the Commission stated, the combined rates of return of the three principal Florida roads in that year were 2.29 per cent and 2.91 per cent, respectively. There is shown also the extent to which the earnings of these roads had been rapidly declining (Ex. No. 1, Sch. 42-44, R. 604-6); that these roads would have sustained severe deficits in both net railway operating income and net income in 1947 and 1948 but for the increases theretofore authorized by the Commission in interstate rates and by the various state commissions in intrastate rates (Ex. No. 1, Sch. 18, R. 587); and it was further shown that in 1948 the railroads in the south as a whole, excluding the A.C.L., S.A.L. and F.E.C. Ry., had rates of return of 3.95 per cent on total investment and 4.97 per cent on investment less depreciation, as contrasted with the combined rates of return of the three Flor-

ida roads of only 2.29 per cent and 2.91 per cent, respectively (Ex. No. 2, R. 607, 212).

In the *North Carolina case* the Court also expressed the view that the Commission had erroneously "relied on the mere existence of a disparity between what it said was a reasonable interstate rate and the intrastate rate fixed by North Carolina" (325 U.S., p. 516). The Court further observed that "there is reasonable doubt as to whether the Commission had ever fixed 2.2 cents as the only reasonable interstate rate"; that the Commission had found that the 1936 coach fare of 1.65 cents would be adequate and "neither unreasonable nor unlawful" and had thereafter made no finding, based on evidence, that it had ceased to be such; and that even assuming that the Commission had previously made a valid 2.2 cents per mile general order broadly applicable to all railroads "it does not follow that such a general order must permanently stand as to each and every separate railroad or railroad system" (325 U.S., pp. 517, 518).

Here, on the other hand, the Commission has made a definite finding, upon due consideration of voluminous evidence submitted by shippers, shipper organizations and railroads, that the interstate rates as in effect to and from Florida were just and reasonable and that the intrastate rates, with the prescribed increases, would not exceed "a just and reasonable level." It has also preserved the right of "the authorities of the State of Florida or any other interested party" to secure an appropriate modification of the findings as to any specific intrastate rates or charges.

Appellants apparently take the view that before the Commission could order a raising of the intrastate rates of the Florida railroads it was essential that it undertake to determine and set out the precise amount of revenue from their intrastate traffic which would constitute a fair

proportionate share of the total income of these railroads. They say further that there is no evidence upon which the Commission could make such a determination since there has been no attempt herein to show a separation of operating expenses and property values assignable to interstate and intrastate operations, respectively (Appellants' brief, p. 29).

We find nothing in either the *North Carolina case* or other decisions of this Court which supports any such meticulous requirements. Experienced railroad accounting officers have testified repeatedly, in this and other cases before the Commission (R. 204), that there is no known way of segregating either railroad operating expenses or railroad property values according to intrastate and interstate operations. Both interstate and intrastate shipments are handled over the same lines of railroad, with the same locomotives and cars, by the same train crews and other employees, and both use the same stations and other railroad facilities. Regardless of what may be the requirements where confiscation has been alleged with respect to state-made rates, both the Commission and the courts have declared that in proceedings arising under section 13(3)(4) of the Act no such separation is necessary.

In *Increases in Alabama Freight Rates and Charges*, 274 I.C.C. 439, 463, the Commission stated:

> "Protestants contend that respondents' evidence does not warrant affirmative findings under section 13(4), chiefly because of the absence of any showing upon which we can determine with exactness the value of all of respondents' properties used for intrastate transportation and the costs of performing such transportation. Apparently they believe that respondents must show the out-of-pocket costs of intrastate freight service segregated from the interstate costs, together with a segregated valuation of carrier property used for intrastate freight transportation. Where,

as is the case here, the intrastate and the interstate traffic move under substantially similar conditions and the expenses of handling the two classes of traffic are inextricably woven together, such a meticulous showing would serve no useful purpose. See *Florida* v. *United States*, 292 U.S. 1, 9; *Illinois Commerce Comm.* v. *United States*, 292 U.S. 474. We find nothing to the contrary in *North Carolina* v. *United States*, 325 U.S. 507."

To the same effect is what was said in the Commission's report herein, 278 I.C.C. at p. 66 (R. 111).

In *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, it was said in the opinion by Mr. Justice Stone, at p. 483:

"Specific objections to the sufficiency of the findings, so far as they are not already disposed of by what has been said, are that there is no finding that the intrastate rates, before the increase, were less than maximum reasonable rates, and there was no finding which separated interstate and intrastate property, revenues and expenses of the carriers so as to make it possible to compare revenues with cost for the two classes of traffic considered separately. But these objections, and others which we need not stop to consider in detail, leave out of account the nature of the traffic and the significance of the principal and subsidiary findings showing that the conditions throughout the district were substantially the same for both classes of traffic, which were handled in the same manner. The inquiry in both proceedings was directed to the commerce of the district as a unit. The decision in the first proceeding, that the increase in interstate rates was reasonable, was made in the hope that the state commissions would bring intrastate rates into harmony. When they failed to do so, the Commission reaffirmed its finding that the new interstate rates were reasonable and found that the intrastate rates must be raised in order that the intrastate traffic may bear its fair

share of the revenue burden. It is plain from the nature of the inquiry that the rate level, to which both classes of traffic were raised, was found reasonable on the basis of the traffic as a whole. *Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues.* Compare American Exp. Co. v. South Dakota, 244 U.S. 617, 61 L. ed. 1352, 37 S. Ct. 656, P.U.R. 1917F, 45; United States v. Louisiana, 290 U.S. 70, ante, 181, 54 S. Ct. 28, supra; Florida v. United States, No. 342 (292 U.S. 1, ante, 1077, 54 S. Ct. 603) supra." (Emphasis supplied.)

It may be observed also that the return to which the Court in the *North Carolina case* said that the intrastate traffic should contribute fairly was stated to be a fair return upon the value of the property devoted to the transportation service "both interstate and intrastate" (325 U.S., p. 520). And in *State of Illinois* v. *United States*, 101 F. Supp. 36 (U. S. District Court, N.D. Illinois,—affirmed by *per curiam* decision, February 4, 1952, 342 U.S. 930) the specially constituted district court upheld an order whereby the Commission had directed a raising of the suburban passenger fares of the Illinois Central Railroad in Chicago and vicinity, the court having found (Conclusion of Law No. 3, at p. 46) that the commutation fares

> "* * * are not producing their fair share of the earnings required to enable petitioner to meet its maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service, *both interstate and intrastate* * * *" (Emphasis supplied).

Should the Commission be required to ascertain and set out the precise amount of revenue which might be said to represent "the fair proportionate share" to be contributed by the intrastate traffic it would be confronted with an impossible undertaking, which might well serve to defeat altogether the performance of its functions and duties in cases of this kind. Moreover, any such determination would necessarily involve numerous purely arbitrary apportionments. In the report herein the Commission stated (278 I. C. C., p. 67, R. 112):

> "Our power to require an increase in intrastate rates depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service, both interstate and intrastate. Respondents are not seeking an increase in the intrastate revenue sufficient to give them a fair return on the value of their property devoted to freight service but merely to secure a contribution to maintenance and operating costs, including taxes, more nearly proportionate to the contribution thereto made prior to the increases in Ex Parte No. 162 and Ex Parte No. 166. We may properly use such prior contribution as a valid criterion of fairness, in the light of which the Florida intrastate rates and charges in 1947 and 1948 afforded a disproportionately small share of the revenue required to meet the costs of the service in Florida. This condition has been aggravated by the continuing rise in operating expenses following Ex Parte No. 162 and Ex Parte No. 166, which impelled us to authorize additional increases in freight rates and charges in Ex Parte No. 168."

Since there has been no showing here that the required increases in the Florida intrastate rates would enable these Florida railroads to earn *anything even approaching a fair return*, there was clearly no occasion or need for the Commission to make specific findings as to what amount of reve-

nue would be needed for such purpose. And so far as concerns the question as to what would constitute a "fair proportionate share" to be contributed by the intrastate traffic the Commission, as quoted above, found that such proportionate contribution might fairly be measured *by the amount of the contribution that had been made by the Florida intrastate traffic prior to the Ex Parte No. 162 and Ex Parte No. 166 increases.* Here the Commission has undertaken to do no more than require Florida intrastate traffic to contribute the additional revenue, needed by the Florida railroads as a part of the national transportation system, which it had fully anticipated that Florida, like all other states, would contribute when the amounts of the increases to be made in the interstate rates were determined and authorized in Ex Parte No. 162 and Ex Parte No. 166.

Appellants, however, say that the Commission was not justified in using Florida's contribution prior to the general interstate increases as a valid criterion of fairness (Appellants' brief, p. 36). In *State of Montana* v. *United States*, 2 F. Supp. 448 (affirmed, *per curiam*, 290 U. S. 593), a specially constituted district court, District of Montana, upheld an order of the Commission directing a general raising of intrastate rates in Montana following nationwide increases theretofore authorized in interstate rates in Ex Parte No. 123, *Fifteen Percent Case, 1931*, 178 I. C. C. 539, 179 I. C. C. 215. Recognizing that both the interstate and intrastate rates are subject to regulatory authorities, the court stated (2 F. Supp., p. 450):

> "By reason of the presumption of regularity in official duty theretofore performed, it is to be assumed, even as it is unquestioned, that at the time of interstate increase ordered interstate rates and intrastate rates were in just relationship, a harmonious whole, each contributing its fair proportion of total revenues in discharge of their common obligation to adequately

maintain the railroads and service in common used by interstate and intrastate commerce.

"Increase interstate destroyed this status, resulted in discrimination against interstate commerce, and obviously, if like increase intrastate to restore the former status would produce more revenue, the discrimination was unjust and thus to be removed. Wisconsin State Rate Case, 257 U. S. 563, 42 S. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086."

Very recently, in *State of Montana, et al.* v. *United States, et al.* (July 24, 1952; August 13, 1952 on further hearing—not yet reported)[15] a special district court for the Montana District has again considered this question in a case involving the 8 percent increase for the west as authorized in Ex Parte No. 168, *Increased Freight Rates, 1948*, 276 I. C. C. 9. Although the court concluded that the Commission's order should be set aside upon other grounds, it expressly rejected the contention, again advanced by the state, that upon the question as to what would constitute the "fair proportionate share" to be contributed by the intrastate traffic the Commission was not justified in using as a criterion of fairness the proportionate amount which such traffic had contributed prior to the general rate increases. After reviewing at length the opinions of this Court in the *North Carolina case*, *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. Co.*, and *Illinois Commerce Comm.* v. *United States*, *supra*, the court stated:

"We think that it is obvious that in the circumstances of this case, where segregation of intrastate costs is found to be impossible, there would be no way in which the Commission could exercise its statutory power to make an order which will require intrastate rates to contribute their fair share toward the revenue required to maintain an efficient railroad system, if

[15] Printed as an appendix to the brief of State of Montana, et al., *amici curiae*.

the method and procedure adopted by the Commission in this case is not permissible. *We do not think that anything said in the North Carolina case could have been intended to have the effect of requiring an impossibility.*

"We are also impressed with the argument made on behalf of the Commission that the 'just relationship' of interstate and intrastate rates mentioned in the opinion of Judge Bourquin in the three-Judge case previously cited may not only be supported by the presumption there mentioned, but that an inference to like effect may be drawn from the fact that for a considerable number of years intrastate rates subject to continuous regulation by the Board and interstate rates subject to continuous regulation by the Commission shook down and fell into a relationship each to the other, which was the result of both action and nonaction by shippers, Board and Commission." (Emphasis supplied.)

In *State of New York* v. *United States*, 98 F. Supp. 855, a specially constituted district court, D. New York, upheld an order of the Commission under Section 13(4) whereby it had directed a raising of the intrastate commutation fares in New York of the New York, New Haven & Hartford Railroad. The judgment was affirmed by this Court, *per curiam*, on November 26, 1951, although it was said in a dissenting expression by Mr. Justice Douglas that "the Commission made no findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income" (*New York* v. *U. S.*, L. Ed. Adv. Op., Dec. 17, 1951, pp. 113, 114).

It can likewise not reasonably be assumed from what was said in the *North Carolina case* that the Court would expect the Commission, as prerequisite to the making of a valid order, to do the impossible by undertaking to determine and name the exact amount of revenue which the Florida railroads require in order to enable them to "operate efficiently." The railroads, of course, must be and are

operated efficiently, in times of depression as well as times of prosperity, but even though so operated their earnings, by reason of lack of traffic or unduly low rates, may fall to a level which threatens their ability to provide "adequate" transportation service within the meaning of Section 15(a) of the Act. If the term "efficiency" of operation is to be construed as conveying also the idea of "adequacy of service" it becomes important to note that the question of such adequacy covers a wide range. A railroad can always improve its service, if the necessary funds are available, by enlarging and modernizing its equipment supply and other facilities. But an attempt to define in any given instance the precise point at which "adequacy" of service is reached, with the view of naming the amount of revenue needed for the provision of such service, would plainly involve the vaguest sort of mere speculation.

Here the Commission has first determined and named the amounts of the general rate increases throughout the country which, in its judgment, would provide the additional revenue needed for the maintenance of the national transportation system of which the Florida railroads constitute a part. It has thereafter determined and set out the amounts of the increases in Florida intrastate rates that were needed in order that the Florida intrastate traffic should contribute fairly to that end. It has further found and stated what it considered *the measure* of such fair contribution, namely, the proportionate amount which the Florida intrastate traffic had been contributing in the past and prior to the increases authorized in Ex Parte No. 162 and Ex Parte No. 166. It has also affirmatively found that the burden cast upon interstate commerce by the prevailing intrastate rates was "undue to the extent that these intrastate rates and charges are less than they would be on the basis herein approved" (Finding No. 5, R. 119). We submit that such findings meet all reasonable and necessary re-

quirements here. As was said by Mr. Chief Justice Hughes in *Florida* v. *United States, supra* (292 U. S., p. 9):

> "The requirement of essential findings as to revenues *did not demand an impracticable exactness.* Losses through inadequate rates could be shown satisfactorily even though proof of the precise extent of such losses was not available. *Reasonable determinations were required and these were made.*" (Emphasis supplied.)

We do not understand that this Court has held, in either the *North Carolina case* or elsewhere, that before the Commission can order a raising of intrastate rates under section 13(4) it must first make a finding that such rates fail to cover the full cost of the service—in other words, are so low as to be actually confiscatory. The Court in the *North Carolina case* referred to certain language appearing in *Florida* v. *United States*, 292 U. S. 1, and the Court then observed that the Commission had failed, among other things, to "indicate that the North Carolina railroad rates here involved were less than compensatory or insufficient to cover the full cost of service." This, we submit, falls far short of a declaration by the Court that such a finding is essential to the support of an order. A requirement of that sort would plainly defeat the whole intent and purpose of section 13(4) and would reduce virtually to a state of impotency the power of the Commission under that section. The order here in question deals with the entire body of the intrastate freight rates in Florida, including hundreds of rates on different commodities, applicable between different points and in varying amounts. It would be utterly impracticable to show with respect to each such rate the full cost of the service and a requirement to that effect would defeat the power of the Commission to proceed in any case of this kind. Furthermore, such requirement would render section 13(4) wholly unnecessary since if actual confiscation can be shown the carriers have an adequate and complete

remedy by direct appeal to the courts. Section 13(4) relates to the removal of undue *discriminaton, preference or prejudice* brought about by reason of disparities between interstate and intrastate rates, and such unlawful discrimination, preference or prejudice may obviously be created although neither the intrastate rates nor the interstate rates are so low as to be non-compensatory or below the full cost of the service. The Court has time and time again upheld the validity of Commission orders under section 13(4) although no such element has been present.

United States v. *Louisiana*, 290 U. S. 70;
Illinois Comm. Comm. v. *United States*, 292 U. S. 474;
Ohio v. *United States*, 292 U. S. 498;
Alabama v. *United States*, 283 U. S. 776;
Georgia Pub. Serv. Comm. v. *United States*, 283 U. S. 765;
New York v. *United States*, 257 U. S. 591.

It may be added that there is nothing in *Florida* v. *United States*, 292 U. S. 1, which indicates that the Court's approval of the Commission's order therein attacked was conditioned upon a finding that the intrastate rates were so low as not to cover the full cost of the service. That case related to a scale of rates, known as the "Cummer scale", which was applicable for the movement of logs for distances not over 170 miles over the lines of the Atlantic Coast Line in Florida. The railroad had introduced before the Commission a cost study which tended to show that the revenue derived from these log rates was insufficient to defray the cost of the transportation. But both the report of the Commission and the opinion of the Court clearly show that the conclusions were in no way hinged primarily upon this matter of costs. The Commission had found and stated in its report (186 I. C. C., p. 187):

> "The record shows the low earnings of defendant; the low earnings on its log traffic as compared with its

> earnings on other low-grade commodities; the much lower earnings on its Florida log traffic than on its interstate log traffic; and the much lower level of the Cummer scale than of other scales applicable interstate and intrastate throughout the South. These facts and the cost evidence clearly warrant the conclusion that the traffic moving under the Cummer scale does not pay its 'fair proportionate share' of operation and maintenance alone."

The Court in its opinion (p. 9) mentioned that the Commission had found, among other things, that the defendant's revenue under the Cummer scale was "insufficient under all the circumstances and conditions to cover the full cost of service." The Court, however, immediately added that "the Commission was able to go further"; and the opinion then refers at length to other findings by the Commission, including a finding that the application of the Cummer scale, instead of the normal level of defendant's interstate log rates, was causing a revenue loss to the carrier of more than $100,000 per year, thus placing "a substantial burden upon defendant's interstate revenues." There can be little room for doubt that the Court's decision would have been the same either with or without a finding by the Commission as to costs.

We submit that expressions in the *North Carolina case* upon which appellants here rely are to be considered in the light of both (1) the essentially different facts of that proceeding, and (2) the conclusions, stated in the opinion, that are believed to constitute basically the grounds of the Court's decision. When so considered such expressions lend no support to appellants' contentions.

The Commission made adequate findings with respect to (1) the possible diversion of traffic from the railroads, and (2) the amount of additional revenue which the prescribed rate increases might be expected to yield.

Although the question appears not to have been raised directly on this appeal, it may be pointed out that the Commission additionally made adequate and appropriate findings with respect to (1) the possible diversion of traffic from the railroads to other transportation agencies, with resulting losses in railroad revenue; and (2) the amount of additional revenue which the prescribed rate increases might be expected to yield.

Upon the subject of possible diversion of traffic the report of the Commission contains the following (278 I. C. C., at p. 61, R. 105):

> "Many protesting shippers, and certain short line railroads, which depend largely upon the log and lumber traffic, contend that the intrastate traffic will not bear an additional increase. The evidence in support of this contention is not entirely convincing. As stated in *Increases in Alabama Freight Rates and Charges, supra*, at page 459, it might be, as is usually the case when extensive rate changes occur, that increases in the intrastate rates would result in some traffic losses to respondents by reason of diversion of tonnage to other competing forms of transportation, but the opinion of one or more protestants that the railroads would receive less aggregate revenue than they are now receiving on certain traffic is purely conjectural, and respondents' evidence is to the contrary."

As the report thus indicates, the Commission had before it and duly considered the testimony upon this subject of various shippers of particular commodities, such as lumber,

fertilizer, pulpwood and several other articles, who expressed the view that any increase in rail rates on those commodities would tend to cause an increase in the movement by truck. But the Commission's findings as above quoted are amply supported by the testimony of responsible and experienced traffic officers of the railroads (Ex. No. 11, p. 76, R. 679; Ex. No. 13, p. 1, R. 683) to the effect that although there might be some increase in the truck movement in particular instances such loss of the traffic by the railroads would be wholly insufficient to prevent the railroad revenue *in the aggregate*, even on these particular commodities, from being increased substantially. The Commission also found, as we have shown (*ante*, p. 46), that the rate increases authorized in Ex Parte No. 162, together with such increases as were thereafter authorized by the several state commissions, had not brought about such diversion of traffic as to prevent substantial increases in the revenue of the railroads; that if such rate increases had not been made effective the earnings of the three principal Florida railroads in 1947, meager as they were, would have been practically wiped out in their entirety; and that instead of a combined net railway operating income of $13,383,693 in that year they would have shown a *deficit* of close to $17,000,000. Exhibit No. 1 (Sch. 21, R. 587) shows that in 1948, during which year the additional Ex Parte No. 166 increases became effective from time to time, both interstate and intrastate to the extent authorized by the state commissions, these three roads without the benefit of such increases would have shown a deficit in net railway operating income of *$37,753,195*.

It can not be successfully asserted, therefore, that the Commission failed to give due consideration to the matter of diversion of traffic from the rail lines, or that its findings upon that subject are not supported by evidence.

Neither is there room for any contention that the Commission failed to set out with sufficient certainty the amount of the increase in revenue that might be expected to be derived from the required increases in rates. The Commission has here found (278 I.C.C., p. 73, R. 119):

> "6. That the establishment of intrastate rates and charges increased sufficiently to equal the level herein approved *will substantially increase respondents' revenues therefrom*, and will constitute not more than a fair proportion of respondents' total income, not taking into consideration the Ex Parte No. 168 increases."

The Commission further found, as we have shown (*ante*, p. 46), that on basis of the intrastate freight shipments actually handled by the railroads in 1948 the application of the prescribed rate increases would have meant an estimated difference and increase in railroad revenue of close to $1,000,000 per annum.

In *United States* v. *Louisiana, supra*, the Court said (290 U. S., at p. 80):

> "The objection that the finding of unjust discrimination by the intrastate rates against interstate commerce is unsupported by any finding that the increased rates would produce increased revenue is rested upon the statement, separated from its context in the Commission's report, 'we conclude that no positive finding in regard to the revenue outcome of the increases can be justified.' It is manifest that any finding of undue prejudice to interstate commerce, based upon the failure of prevailing intrastate rates to contribute their fair share to the support of a national transportation system, must necessarily rest upon a prediction that an increase of the intrastate rates will result in an increase of revenue, a prediction involving, especially since 1930, many elements of uncertainty. There are no formal requirements for the findings to be made by the Commis-

sion in this type of case, see Manufacturers R. Co. v. United States, 246 U. S. 467, 490, 62 L. Ed. 836, 848, 38 S. Ct. 383, and while the particular form in which they were cast here is not to be commended, *the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data, including estimates of experienced railroad traffic men, to which the report refers, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute.* (Emphasis supplied.)

And in the more recently decided "Barge Line Cases", *Alabama Great S. R. Co.* v. *United States* (Jan. 2, 1951), 340 U. S. 216, 95 L. Ed. 225, 228, it was said in the opinion by Mr. Justice Minton:

> "And 'the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data. . . .' *United States* v. *Louisiana*, 290 U. S. 70, 80, 78 L. Ed. 181, 188, 54 S. Ct. 28. Enough has been 'put of record to enable us to perform the limited task which is ours.' *Eastern-Central Motor Carriers Asso.* v. *United States*, 321 U. S. 194, 212, 88 L. Ed. 668, 680, 64 S. Ct. 499."

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The Commission also found that transportation conditions incident to intrastate transportation in Florida are not more favorable, and in the Florida peninsula are less favorable, as contrasted with interstate transportation to and from Florida and within the south generally, and such finding is supported by evidence.

Among the Commission's ultimate findings the following appears as Finding No. 2:

> "2. That the transportation conditions incident to the intrastate transportation of freight in Florida are

not more favorable and such conditions in the Florida peninsula are somewhat less favorable than those (1) within southern territory and (2) between Florida and interstate points."

Under the caption "Relative transportation conditions" the report of the Commission contains also the following (278 I.C.C., p. 63, R. 107):

"Responsible operating witnesses of the Seaboard and the Coast Line, which carriers have the longest mileage in Florida and also operate in other southern States, testified that purely operating conditions in Florida are no more favorable and even less favorable than those existing in adjacent States. For the Coast Line, Seaboard, and East Coast combined, (a) Florida operations, (b) system operations, and (c) operations of all carriers in the entire southern region, respectively, in 1947, the revenue tons per train-mile were 703.9, 724.2, and 843.1 tons; the revenue tons per locomotive mile-road were 688.7, 687.1, and 787.7 tons; the revenue tons per car-mile were 18.4, 17.3, and 19.4 tons; the freight operating ratios were 75.4, 75.6 and 72.3; and the passenger operating ratios were 112.8, 116, and 117.2.

"Intrastate and interstate traffic in Florida is intermingled and carried in the same trains, whether through or local, on main and branch lines, and the same employees are engaged in handling both kinds of traffic. In fact, the cost of train operations is higher on intrastate than on interstate traffic by reason of the fact that the preponderance of the intrastate traffic is in local trains, whereas the interstate traffic moves predominantly in through trains." (Here follow typical examples of train movements.)

The foregoing findings are amply supported by evidence. The comparisons shown, for the three Florida railroads, of Florida operations, system operations and operations of all carriers in the southern region, were taken from exhibits

filed by a witness for the Florida Commission (Nos. 60 and 63, R. 763, 768A). Exhibit No. 1 (Sch. 29, R. 595), filed by the railroads, deals specifically with operations of the A.C.L. and S.A.L. in Florida, as contrasted with other portions of the systems lying outside of Florida, and shows among other things that the density or volume of traffic, which has a direct bearing upon the cost of conducting transportation, is far less in Florida than on other portions of the systems. For example, in 1947 the number of tons of revenue freight per mile of road operated on the A.C.L.'s lines in Florida was *only 64.68 per cent* of the corresponding figure for the system as a whole outside of Florida, and in 1948 was *only 62.93 per cent;* while for the Seaboard Air Line the corresponding figures were 68.64 per cent and 69.71 per cent, respectively. Exhibit No. 4 (R. 608) shows that in 1948 "freight transportation expenses per 1,000 revenue ton miles" on the Seaboard's lines in Florida were 139.85 per cent of the corresponding figure for the system outside of Florida; that in "train service expenses per train mile" this excess was 116.31 per cent; in "crew wages per loaded car mile" 142 per cent; and in "transportation expenses per loaded car mile" the excess was 153.92 per cent. The same exhibit shows that the percentage of empty to loaded car miles on the lines in Florida was 136.57 per cent of the corresponding percentage for the balance of the system.

Operating officers of the A.C.L. and S.A.L. testified that train operations in the handling of intrastate traffic in Florida are more expensive than such operations in the handling of interstate traffic moving to or from Florida for the reason, among others, that the preponderance of the intrastate traffic is handled in *local* trains, which are more expensive to operate than the *through* trains in which the preponderance of the interstate traffic is handled. (R. 157, 176).

As to "Persons-localities" preference or prejudice.

The Commission made no general finding of preference or prejudice between persons or localities in intrastate commerce, on the one hand, and persons or localities in interstate commerce, on the other hand. Its general finding upon this subject (Finding No. 7), related to *localities* in Florida, on the one hand, and *localities* in other states, on the other hand; while its finding with respect to persons, i.e., shippers, was limited to shippers of a single commodity, namely, cement. Reference was made in the report (278 I.C.C., pp. 48-57, R. 89-106) to numerous shipments of large numbers of different commodities which move to destinations, located throughout the entire state, from localities in other states and from competing localities within Florida, respectively, at rates lower for the intrastate than for the interstate movements (Ex. No. 12, Sections B and C, R. 616, 620).

The court below expressed the view (R. 137) that it was "doubtful" whether the order could be sustained under that branch of Section 13(4) which relates to preference or prejudice between persons or localities, but that the order was clearly sustainable upon the ground of undue and unlawful discrimination against interstate commerce. No question relating to such "persons-localities" preference or prejudice appears to have been raised by appellants on this appeal (Appellants' Statement as to Jurisdiction, pp. 2, 3).

CONCLUSION

The record here shows that the Commission made all essential basic findings to support the ultimate conclusions upon which the order herein attacked was entered. Those findings are supported in the record by substantial evidence. All appropriate procedural steps were taken, including

notice, hearing, receipt of material evidence, briefs and oral argument on behalf of the interested parties, all in keeping with the applicable statutes and the Rules of Practice of the Commission. The Commission also proceeded in all other respects in conformity with its statutory duty and authority. We submit that the District Court committed no error in refusing the injunction and dismissing the complaint attacking the order of the Commission and that its judgment should, therefore, be affirmed.

Respectfully submitted,

JAMES A. BISTLINE,
FRANK W. GATHMEY,
Attorneys for Railroad Appellees.

OCTOBER 3, 1952.

APPENDIX

U. S. Code, Title 49, Section 13(2)(3)(4).

"(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commission sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

"(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to

hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part of part III.

"(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in Intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

U. S. Code, Title 49, Section 15a(2).

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

National Transportation Policy

54 Stat. 899, 49 U. S. C. 4281.

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."